

13-20-00261-CV

In The Court Of Appeals FILED IN
13th COURT OF APPEALS
CORPUS CHRISTI/EDINBURG, TEXAS
Thirteenth District Of Texas At Corpus Christi 9/2/2020 2:14:43 PM
KATHY S. MILLS
Clerk

CERTAIN UNDERWRITERS AT LLOYD’S OF LONDON SUBSCRIBING
TO POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality,
Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,

Plaintiff-Appellant

v.

MAYSE & ASSOCIATES, INC.,

Defendant-Appellee.

**MOTION BY APPELLEE, MAYSE & ASSOCIATES, INC.
TO DISMISS UNDERWRITERS’ APPEALS**

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Texas Rule of Appellate Procedure 10.5(b) and 42.3, Appellee, Mayse & Associates, Inc. (“Mayse”) respectfully submits this Motion to Dismiss the appeals taken by the Plaintiff-Appellant, CERTAIN UNDERWRITERS AT LLOYD’S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87 (“Underwriters”). In support of this request, Mayse states as follows.

1. This matter involves Underwriters’ subrogation action, filed in the District Court for Aransas County, Texas (343rd Judicial District). The style of the case is *Certain Underwriters at Lloyd’s of London Subscribing to Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny*

Hospitality d/b/a Fairfield Inn & Suites v. K K Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC, and Mayse & Associates, Inc., Cause No. DC-15-12370.

2. There is no final judgment in this case.

3. Underwriters have filed a series of appeals that should all be dismissed for lack of jurisdiction.

4. On July 10, 2020, Underwriters appealed the District Court's June 11, 2020 Order Granting Mayse & Associate, Inc.'s Motion to Dismiss for Violation of the Texas Certificate of Merit Law (*Tex. Civ. Prac. & Rem. Code*. §150.002). *See Exhibit "A."* This appeal should be dismissed because it was not filed within twenty days of June 11th. Underwriters recently filed a Motion to Retroactively Extend Time To File Notice of Appeal. Mayse is reviewing this motion and will respond as soon as possible. Meanwhile, Underwriters admit that the appeal of the District Court's June 11, 2020 Order was not timely filed.

5. On July 13, 2020, Underwriters filed an Amended Notice of Appeal that deleted an appeal concerning a party the Underwriters non-suited, 1113 Structural Engineers, PLLC. *See Exhibit "B."*

6. On August 28, 2020, the Underwriters filed a Notice of Appeal that included the District Court's rulings against the Underwriters motions, Motion for New Trial, Motion to Modify the Judgment, and Motion for Reconsideration and an evidentiary ruling in connection with those motions. *See Exhibit "C."*

7. On August 31, 2020, Underwriters filed an Amended Notice of Accelerated Appeal, which re-cast its August 28, 2020 appeal as “accelerated.” *See Exhibit “D.”*

8. The underlying case is a claim by a hotel owner’s subrogated underwriters against parties involved in the design and construction of the hotel whom the Underwriters claim are responsible for causing damage to the hotel during Hurricane Harvey on August 25, 2017. Mayse was the Architect of Record, KK Builders LLC was the general contractor, D’Amato Conversano, Inc., dba DCI Engineers was the structural engineer, and 1113 Structural Engineers was a structural engineering consultant.

9. Mayse (and DCI and 1113 Engineers) filed a motion to dismiss Underwriters’ claims for their failure to comply with the Texas Certificate of Merit Law, *Tex. Civ. Prac. & Rem. Code*. §150.002. The District Court granted this motion on June 11, 2020.

10. The Court should dismiss the Underwriters’ appeals of the District Court’s June 11, 2020 dismissal of the Underwriters’ claims against Mayse. In Underwriters’ Notice of Appeal and Amended Notice of Appeal, they state that the District Court’s Orders are interlocutory orders immediately appealable under Section 150.002(f) of the Texas Civil Practice and Remedies Code. *See TEX. CIV. PRAC. & REM. CODE ANN.* § 150.002(f) (West 2011) (“An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.”).

11. Texas Rule of Appellate Procedure 28.1(a) provides that: “[a]ppeals from interlocutory orders (when allowed by statute)” are considered accelerated appeals. TEX. R. APP. P. 28.1(a). Moreover, Rule 28.1(b) states that accelerated appeals must be perfected “by filing a notice of appeal in compliance with Rule 25.1 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3. Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.” *Id.* at R. 28.1(b). Rule 26.1(b), in particular, requires that, in an accelerated appeal, the notice of appeal must be filed within twenty days after the judgment or order is signed. *Id.* at R. 26.1(b).

12. In the instant case, as stated in their Notices of Appeal, the trial court signed its order granting Mayse’s motion to dismiss on June 11, 2020. However, appellants did not file their notice of appeal until July 10, 2020, which is twenty-nine days after the trial court’s June 11, 2020 Order.

13. Accordingly, Appellants’ Notice of Appeal in this matter of the District Court’s June 11, 2020 Order is untimely.

14. Because there is no final Judgment, the Court currently has no jurisdiction over the District Court’s denial of Underwriters’ post-trial motions and Underwriters cite no authority to immediately appeal the court’s rulings on their motions in the absence of a final judgment.

“The denial of a motion for new trial is an appealable order. *See Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex.1984). However, TRAP 26.1 establishes the deadline for filing a notice of appeal based on the date that the judgment was signed. The denial of a motion for

new trial, being dependent upon the entry of the final judgment, must be appealed in the same manner as the final judgment is appealed. See TRAP 26.1; Powell v. Linh Nutrition Programs, Inc., No. 01–03–00919–CV, 2005 Tex. App. LEXIS 1317, at *2 (Tex. App.-Houston [1st Dist.] 2005, no pet.)”

Westridge Apartments v. Gomez, No. 07-09-0256-CV, 2009 WL 2601610, at *1 (Tex. App.-Amarillo Aug. 25, 2009, no. pet.) (mem.op.)

15. Underwriters have not cited any authority as to why they are entitled to accelerated appeals of the District Court’s rulings on their post-trial motions and evidentiary ruling.

16. On September 2, 2020, Mayse’ counsel conferred with counsel for Underwriters regarding concurrence in several Mayse’s motion to dismiss Underwriters’ appeals. Counsel for Underwriters did not concur.

WHEREFORE, Appellee, Mayse, respectfully requests that its Motion to Dismiss Underwriters’ appeals be granted and that all of Underwriters’ appeals be dismissed.

Respectfully submitted,

CAPSHAW & ASSOCIATES
3500 Maple Avenue, Suite 1100
Dallas, Texas 75219
214.761.6610 214.761.6611 (F)

By: /s/ Stanhope B. Denegre
Richard A. Capshaw (richard@capslaw.com)
State Bar No. 03783800
Stanhope B. Denegre (stan@capslaw.com)
State Bar No. 24014734
COUNSEL FOR APPELLEE
MAYSE & ASSOCIATES, INC.

CERTIFICATE OF SERVICE

Pursuant to Rule 21 of the Tex. R. Civ. P., I hereby certify that on the 2nd day of September 2020, a copy of the foregoing document was served upon all attorneys of record.

/s/ Stanhope B. Denegre

Stanhope B. Denègre

EXHIBIT "A"

CAUSE NO. 19-0236

CERTAIN UNDERWRITERS AT	§	IN THE DISTRICT COURT OF
LLOYD'S OF LONDON SUBSCRIBING	§	
TO POLICY NO. NAJL05000016-H87, as	§	
Subrogee of Momentum Hospitality, Inc. &	§	ARANSAS COUNTY, TEXAS
75 and Sunny Hospitality d/b/a Fairfield Inn	§	
& Suites,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
K K BUILDERS, LLC, D'AMATO	§	
CONVERSANO, INC d/b/a DCI Engineers,	§	
1113 STRUCTURAL ENGINEERS, PLLC,	§	
and MAYSE & ASSOCIATES, INC.,	§	343 rd JUDICIAL DISTRICT
Defendants.		

PLAINTIFF'S NOTICE OF APPEAL

Plaintiff, CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87 ("Underwriters") files this Notice of Appeal pursuant to Texas Rule of Appellate Procedure 25.1. showing the Court as follows:

1. This appeal is taken from the 343rd Judicial District Court of Aransas County, Texas, the Honorable Janna K. Whatley presiding.
2. The style of the case is *Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites v. K K Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC, and Mayse & Associates, Inc.*, Cause No. DC-15-12370.
3. Underwriters desire to appeal the District Court's June 11, 2020 Order Granting Motion to Strike Certificate of Merit and Dismiss With Prejudice (pertaining to Defendant 1133 Structural Engineers, PLLC), as well as the District Court's June 11, 2020 Order Granting Mayse & Associate,

Inc.'s Motion to Dismiss for Violation of the Texas Certificate of Merit Law. Copies of both Orders are attached.

4. This appeal is taken to the Thirteenth Court of Appeals at Corpus Christie, Texas.

5. While the two Orders do not resolve all claims against all Defendants, they are immediately appealable as interlocutory orders pursuant to *Tex. Civ. Prac. & Rem. Code* §150.002(f).

6. Contemporaneous with this Notice of Appeal, Underwriters have filed with the District Court a Motion for Reconsideration of the two subject Orders. Because it is unclear whether the filing of such a Motion has any impact on the period of time in which Underwriters may appeal from these Orders, to protect their interests Underwriters are filing this Notice of Appeal. Should the Motion for Reconsideration subsequently be granted (thereby mootting this appeal), Underwriters will promptly file a voluntary dismissal of this appeal.

7. Underwriters previously ordered and paid for a transcript of the June 5, 2020 hearing on the two Motions to Dismiss that resulted in the two Orders being appealed. The Court Reporter prepared that transcript, and on information and belief filed it with the District Court on June 17, 2020. As such, Underwriters have made no additional request for a Reporter's Record on appeal.

Respectfully submitted,

DENENBERG TUFFLEY

/s/ Paul B. Hines

PAUL B. HINES (Texas Bar No. 24104750)

MICHAEL R. MARX (*Admitted Pro Hac Vice*)

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Southfield, MI 48034

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phines@dt-law.com

mmarx@dt-law.com

Attorneys for Plaintiff Certain Underwriters at Lloyd's
of London

CERTIFICATION OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record of all parties to the above cause via Texas Court's e-filing system, which sends notice to counsel of record on the 10th day of July, 2020.

/s/ Felicia Tyson
Felicia Tyson

CASE NO.: 19-0236

CERTAIN UNDERWRITERS AT	§	IN THE DISTRICT COURT OF
LLOYD'S OF LONDON SUBSCRIBING	§	
TO POLICY NO. NAJL05000016-H87,	§	
As Subrogee of Momentum Hospitality,	§	
Inc. & 75 and Sunny Hospitality d/b/a	§	
Fairfield Inn & Suites	§	
<i>Plaintiffs,</i>	§	ARANSAS COUNTY, TEXAS
v.	§	
KK BUILDERS, LLC, D'AMATO	§	
CONVERSANO, INC. d/b/a DCI	§	
ENGINEERS and 1113 STRUCTURAL	§	
ENGINEERS, PLLC	§	
<i>Defendants.</i>	§	343RD JUDICIAL DISTRICT

**ORDER GRANTING MAYSE & ASSOCIATES, INC.'S MOTION TO DISMISS FOR
VIOLATION OF THE TEXAS CERTIFICATE OF MERIT LAW**

This Court has considered Defendant, Mayse & Associates, Inc.'s Motion to Dismiss for Violation of The Texas Certificate of Merit Law ("Motion"). Upon consideration of the Motion, any response, the pleadings on file, and the oral arguments of counsel, if any, the Court is of the opinion the Motion is well made. It is accordingly granted in entirety and

ORDERED, ADJUGED AND DECREED that Defendant, Mayse & Associates, Inc.'s Motion to Dismiss for Violation of The Texas Certificate of Merit Law is granted. It is further,

ORDERED, ADJUGED AND DECREED that any and all claims of Plaintiffs, Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites, are Dismissed with Prejudice as to Defendant, Mayse & Associates, Inc.

This is a final judgment as to Defendant, Mayse & Associates, Inc., and disposes of any and all claims against Defendant, Mayse & Associates, Inc. Any and all further relief is denied.

ENTERED this 11 day of June, 2020.

Denne Whately
JUDGE PRESIDING

CC: District Clerk
Paul Hines/Evan Malinowski
Sachi Dave/Jonathan Gutlin
Paul Goldenberg/William Luyties
Richard Capshaw/Stanhope Denegre
Mark Youngjohn/Aaron Pool

EXHIBIT "B"

CAUSE NO. 19-0236

CERTAIN UNDERWRITERS AT	§	IN THE DISTRICT COURT OF
LLOYD'S OF LONDON SUBSCRIBING	§	
TO POLICY NO. NAJL05000016-H87, as	§	
Subrogee of Momentum Hospitality, Inc. &	§	ARANSAS COUNTY, TEXAS
75 and Sunny Hospitality d/b/a Fairfield Inn	§	
& Suites,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
K K BUILDERS, LLC, D'AMATO	§	
CONVERSANO, INC d/b/a DCI Engineers,	§	
1113 STRUCTURAL ENGINEERS, PLLC,	§	
and MAYSE & ASSOCIATES, INC.,	§	343 rd JUDICIAL DISTRICT
Defendants.		

PLAINTIFF'S AMENDED NOTICE OF APPEAL

Plaintiff, CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87 ("Underwriters") files this Notice of Appeal pursuant to Texas Rule of Appellate Procedure 25.1. showing the Court as follows:

1. This appeal is taken from the 343rd Judicial District Court of Aransas County, Texas, the Honorable Janna K. Whatley presiding.
2. The style of the case is *Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites v. K K Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC, and Mayse & Associates, Inc.*, Cause No. DC-15-12370.
3. Underwriters desire to appeal the District Court's June 11, 2020 Order Granting Mayse & Associate, Inc.'s Motion to Dismiss for Violation of the Texas Certificate of Merit Law. A copy of the Order is attached.

4. This appeal is taken to the Thirteenth Court of Appeals at Corpus Christie, Texas.

5. While the Order does not resolve all claims against all Defendants, they are immediately appealable as an interlocutory order pursuant to *Tex. Civ. Prac. & Rem. Code*. §150.002(f).

6. Contemporaneous with this Notice of Appeal, Underwriters have filed with the District Court a Motion for New Trial, Motion to Modify, and Motion for Reconsideration, of the subject Order. Because it is unclear whether the filing of such a Motion has any impact on the period of time in which Underwriters may appeal from this Order, to protect their interests Underwriters are filing this Notice of Appeal. Should the Motion for New Trial, Motion to Modify, and Motion for Reconsideration subsequently be granted (thereby mooting this appeal), Underwriters will promptly file a voluntary dismissal of this appeal.

7. Underwriters previously ordered and paid for a transcript of the June 5, 2020 hearing on the Motion to Dismiss that resulted in the Order being appealed. The Court Reporter prepared that transcript, and on information and belief filed it with the District Court on June 17, 2020. As such, Underwriters have made no additional request for a Reporter's Record on appeal.

Respectfully submitted,

DENENBERG TUFFLEY

/s/ Paul B. Hines

PAUL B. HINES (Texas Bar No. 24104750)

MICHAEL R. MARX (*Admitted Pro Hac Vice*)

28411 Northwestern Hwy, Suite 600

Southfield, MI 48034

Phone | (248) 549-3900

Facsimile | (248) 593-5808

phines@dt-law.com

mmarx@dt-law.com

Attorneys for Plaintiff Certain Underwriters at Lloyd's
of London

CERTIFICATION OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record of all parties to the above cause via Texas Court's e-filing system, which sends notice to counsel of record on the 13th day of July, 2020.

/s/ Felicia Tyson
Felicia Tyson

CASE NO.: 19-0236

CERTAIN UNDERWRITERS AT	§	IN THE DISTRICT COURT OF
LLOYD'S OF LONDON SUBSCRIBING	§	
TO POLICY NO. NAJL05000016-H87,	§	
As Subrogee of Momentum Hospitality,	§	
Inc. & 75 and Sunny Hospitality d/b/a	§	
Fairfield Inn & Suites	§	
<i>Plaintiffs,</i>	§	ARANSAS COUNTY, TEXAS
v.	§	
KK BUILDERS, LLC, D'AMATO	§	
CONVERSANO, INC. d/b/a DCI	§	
ENGINEERS and 1113 STRUCTURAL	§	
ENGINEERS, PLLC	§	
<i>Defendants.</i>	§	343RD JUDICIAL DISTRICT

**ORDER GRANTING MAYSE & ASSOCIATES, INC.'S MOTION TO DISMISS FOR
VIOLATION OF THE TEXAS CERTIFICATE OF MERIT LAW**

This Court has considered Defendant, Mayse & Associates, Inc.'s Motion to Dismiss for Violation of The Texas Certificate of Merit Law ("Motion"). Upon consideration of the Motion, any response, the pleadings on file, and the oral arguments of counsel, if any, the Court is of the opinion the Motion is well made. It is accordingly granted in entirety and

ORDERED, ADJUGED AND DECREED that Defendant, Mayse & Associates, Inc.'s Motion to Dismiss for Violation of The Texas Certificate of Merit Law is granted. It is further,

ORDERED, ADJUGED AND DECREED that any and all claims of Plaintiffs, Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites, are Dismissed with Prejudice as to Defendant, Mayse & Associates, Inc.

This is a final judgment as to Defendant, Mayse & Associates, Inc., and disposes of any and all claims against Defendant, Mayse & Associates, Inc. Any and all further relief is denied.

ENTERED this 11 day of June, 2020.

Janne Whately
JUDGE PRESIDING

CC: District Clerk
Paul Hines/Evan Malinowski
Sachi Dave/Jonathan Gutlin
Paul Goldenberg/William Luyties
Richard Capshaw/Stanhope Denegre
Mark Youngjohn/Aaron Pool

EXHIBIT "C"

CAUSE NO. 19-0236

CERTAIN UNDERWRITERS AT	§	IN THE DISTRICT COURT OF
LLOYD'S OF LONDON SUBSCRIBING	§	
TO POLICY NO. NAJL05000016-H87, as	§	
Subrogee of Momentum Hospitality, Inc. &	§	ARANSAS COUNTY, TEXAS
75 and Sunny Hospitality d/b/a Fairfield Inn	§	
& Suites,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
K K BUILDERS, LLC, D'AMATO	§	
CONVERSANO, INC d/b/a DCI Engineers,	§	
1113 STRUCTURAL ENGINEERS, PLLC,	§	
and MAYSE & ASSOCIATES, INC.,	§	343 rd JUDICIAL DISTRICT
Defendants.		

PLAINTIFF'S NOTICE OF APPEAL

Plaintiff, CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87 ("Underwriters") files this Notice of Appeal pursuant to Texas Rule of Appellate Procedure 25.1. showing the Court as follows:

1. This appeal is taken from the 343rd Judicial District Court of Aransas County, Texas, the Honorable Janna K. Whatley presiding.
2. The style of the case is *Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites v. K K Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC, and Mayse & Associates, Inc.*, Cause No. DC-15-12370.
3. Underwriters desire to appeal from the following three Orders (copies of all three Orders are attached):

A. The District Court's August 24, 2020 Order Granting Mayse & Associate, Inc.'s Motion to Strike the Supplemental Affidavit of Mr. Itle attached to Underwriters' Motion for New Trial, Motion to Modify the Judgment, and Motion for Reconsideration.

B. The District Court's August 24, 2020 Order on Plaintiff's Motion for New Trial, Motion to Modify the Judgment, and Motion for Reconsideration (denying that Motion).

C. The District Court's August 24, 2020 Order on DCI Engineers' Motion to Dismiss (granting that Motion).

4. This appeal is taken to the Thirteenth Court of Appeals at Corpus Christie, Texas.

5. While the Order does not resolve all claims against all Defendants, they are immediately appealable as interlocutory orders pursuant to *Tex. Civ. Prac. & Rem. Code*. §150.002(f).

6. Underwriters have already commenced an appeal from the District Court's June 11, 2020 Order granting Mayse & Associates, Inc.'s Motion to Dismiss (for the alleged violation of *Tex. Civ. Prac. & Rem. Code*. §150.002). That is Thirteenth Court of Appeals Cause No. 13-20-00261-CV.

A. The first two Orders referred to above are directly connected with that appeal. They represent motions -- concerning the Defendant/Appellee (Mayse & Associates, Inc.) and *Tex. Civ. Prac. & Rem. Code*. §150.002 -- filed and/or resolved after that appeal was filed.

B. The third Order referred to above is also connected with that appeal. It concerns a different Defendant (DCI Engineers) subsequently being dismissed from this action on the same grounds as the Defendant/Appellee (Mayse & Associates, Inc.) in that appeal.

C. **Consequently, once the Thirteenth Court of Appeals assigns a docket number to this appeal, Underwriters will promptly move to consolidate the two appeals.**

7. No hearings were conducted regarding the three Orders that are the subject of this appeal, so there will be no Reporter's Record on appeal.

8. Counsel for Underwriters will promptly contact the Clerk of the Court to arrange for the Clerk's record on appeal.

Respectfully submitted,

DENENBERG TUFFLEY

/s/ Paul B. Hines

PAUL B. HINES (Texas Bar No. 24104750)

MICHAEL R. MARX (*Admitted Pro Hac Vice*)

28411 Northwestern Hwy, Suite 600

Southfield, MI 48034

Phone | (248) 549-3900

Facsimile | (248) 593-5808

phines@dt-law.com

mmarx@dt-law.com

Attorneys for Plaintiff Certain Underwriters at Lloyd's
of London

CERTIFICATION OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record of all parties to the above cause via Texas Court's e-filing system, which sends notice to counsel of record on the 28th day of August, 2020.

/s/ Felicia Tyson

Felicia Tyson

NO. 19-0236

CERTAIN UNDERWRITERS AT
LLOYD'S OF LONDON, ET AL

V.

K K BUILDERS, LLC, ET AL

§
§
§
§
§
§

IN THE DISTRICT COURT

ARANSAS COUNTY, TEXAS

343RD JUDICIAL DISTRICT

ORDER ON DCI ENGINEERS' MOTION TO DISMISS

On this day came on to be heard Defendant D'Amato Conversano, Inc. d/b/a DCI Engineers' Motion to Dismiss Under Chapter 150, Texas Civil Practice & Remedies Code, and the Court, after review of the motion, any responses thereto, and the arguments of counsel, is of the opinion that this motion should be GRANTED. It is therefore,

ORDERED that the claims of Plaintiff, Certain Underwriters at Lloyds, London Subscribing to Policy No. NAJ05000016-H87, as Subrogee of Momentum Hospitality, Inc. and 75 & Sunny Hospitality d/b/a Fairfield Inn & Suites, against D'Amato Conversano, Inc. d/b/a DCI Engineers are hereby dismissed with prejudice.

SIGNED Aug 24, 2020.

Jenn Chhaty
JUDGE PRESIDING

CC: District Clerk

Paul Hines / Evan Malinowski
Sachi Dave / Jonathan Gittlin
Paul Goldenberg / William Lufies
Richard Capshaw / Stanhope Denege
Mark Youngjohn / Aaron Pool
Michael Marx

RECEIVED

JUL 27 2020

CASE NO.: 19-0236

CERTAIN UNDERWRITERS AT	§	IN THE DISTRICT COURT OF
LLOYD'S OF LONDON SUBSCRIBING	§	
TO POLICY NO. NAJL05000016-H87,	§	
As Subrogee of Momentum Hospitality,	§	
Inc. & 75 and Sunny Hospitality d/b/a	§	
Fairfield Inn & Suites	§	
<i>Plaintiffs,</i>	§	ARANSAS COUNTY, TEXAS
v.	§	
KK BUILDERS, LLC, D'AMATO	§	
CONVERSANO, INC. d/b/a DCI	§	
ENGINEERS and 1113 STRUCTURAL	§	
ENGINEERS, PLLC	§	
<i>Defendants.</i>	§	343RD JUDICIAL DISTRICT

**ORDER ON PLAINTIFF'S MOTION FOR NEW TRIAL,
MOTION TO MODIFY THE JUDGEMENT
AND MOTION FOR RECONSIDERATION**

CAME ON this day for consideration the Motion for New Trial, Motion to Modify the Judgement and Motion for Reconsideration (the "Motions") filed by Plaintiff, Certain Underwriters at Lloyd's of London Subscribing to Policy No.: NAJL05000016-H87 ("Plaintiff"). After considering the Motions, the pleadings on file, along with any supporting affidavits and exhibits, the Court is of the opinion that the Motions should be DENIED. It is, therefore,

ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for New Trial, Motion to Modify the Judgement and Motion for Reconsideration are DENDIED.

SIGNED Aug. 24, 2020, 2020.

CC: District Clerk
Paul Hines/ Evan Malinowski
Sachi Dawe/ Jonathan Gitlin
Paul Goldenberg/ William Luyties
Richard Capshaw/ Stanhope Denegre
Mark Youngjohn/ Aaron Peol
Michael Marx

Jennalhaty
JUDGE PRESIDING

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AUG 14 2020

CASE NO.: 19-0236

CERTAIN UNDERWRITERS AT	§	IN THE DISTRICT COURT OF
LLOYD'S OF LONDON SUBSCRIBING	§	
TO POLICY NO. NAJL05000016-H87,	§	
As Subrogee of Momentum Hospitality,	§	
Inc. & 75 and Sunny Hospitality d/b/a	§	
Fairfield Inn & Suites	§	
<i>Plaintiffs,</i>	§	ARANSAS COUNTY, TEXAS
v.	§	
KK BUILDERS, LLC, D'AMATO	§	
CONVERSANO, INC. d/b/a DCI	§	
ENGINEERS and 1113 STRUCTURAL	§	
ENGINEERS, PLLC	§	
<i>Defendants.</i>	§	343RD JUDICIAL DISTRICT

**ORDER GRANTING MAYSE & ASSOCIATES, INC.'S MOTION TO STRIKE THE
SUPPLEMENTAL AFFIDAVIT OF MR. ITLE ATTACHED TO UNDERWRITERS'
MOTION FOR NEW TRIAL, MOTION TO MODIFY THE JUDGEMENT,
AND MOTION FOR RECONSIDERATION**

This Court has considered Defendant, Mayse & Associates, Inc.'s Motion to Strike the Supplemental Affidavit of Mr. Itle attached to Plaintiffs' Motion for New Trial, Motion to Modify the Judgement, and Motion for Reconsideration ("Motion"). Upon consideration of the Motion, any response, the pleadings on file, and the oral arguments of counsel, if any, the Court is of the opinion the Motion is well made. It is accordingly granted in entirety, and

ORDERED, ADJUGED AND DECREED that Defendant, Mayse & Associates, Inc.'s Motion to Strike the Supplemental Affidavit of Mr. Itle attached to Underwriters' Motion for New Trial, Motion to Modify the Judgement, and Motion for Reconsideration is granted. It is further,

ORDERED, ADJUGED AND DECREED that the Supplemental Affidavit of Mr. Itle that Plaintiffs filed as an exhibit to Plaintiffs' Motion for New Trial, Motion to Modify the Judgment, and for Reconsideration its post-trial motions is hereby stricken from the record and will not be considered in connection with Plaintiffs' Motion for New Trial, Motion to Modify the Judgment, and for Reconsideration.

ENTERED this 24 day of Aug., 2020.

Jane Whately
JUDGE PRESIDING

CC: District Clerk
Paul Hines / Evan Malinowski
Sachi Dae / Jonathan Gittlin
Paul Goldenberg / William Luyties
Richard Capshaw / Stanhope Denege
Mark Youngjohn / Aaron Pool
Michael Marx

transforming

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AUG 05 2020

EXHIBIT "D"

CAUSE NO. 19-0236

CERTAIN UNDERWRITERS AT	§	IN THE DISTRICT COURT OF
LLOYD'S OF LONDON SUBSCRIBING	§	
TO POLICY NO. NAJL05000016-H87, as	§	
Subrogee of Momentum Hospitality, Inc. &	§	ARANSAS COUNTY, TEXAS
75 and Sunny Hospitality d/b/a Fairfield Inn	§	
& Suites,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
K K BUILDERS, LLC, D'AMATO	§	
CONVERSANO, INC d/b/a DCI Engineers,	§	
1113 STRUCTURAL ENGINEERS, PLLC,	§	
and MAYSE & ASSOCIATES, INC.,	§	343 rd JUDICIAL DISTRICT
Defendants.		

PLAINTIFF'S AMENDED NOTICE OF ACCELERATED APPEAL

Plaintiff, CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87 ("Underwriters") files this Amended Notice of *Accelerated* Appeal pursuant to Texas Rule of Appellate Procedure 25.1, showing the Court as follows:

1. This appeal is taken from the 343rd Judicial District Court of Aransas County, Texas, the Honorable Janna K. Whatley presiding.
2. The style of the case is *Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites v. K K Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC, and Mayse & Associates, Inc.*, Cause No. DC-15-12370.
3. Underwriters desire to appeal from the following three Orders (copies of all three Orders are attached):

A. The District Court's August 24, 2020 Order Granting Mayse & Associate, Inc.'s Motion to Strike the Supplemental Affidavit of Mr. Itle attached to Underwriters' Motion for New Trial, Motion to Modify the Judgment, and Motion for Reconsideration.

B. The District Court's August 24, 2020 Order on Plaintiff's Motion for New Trial, Motion to Modify the Judgment, and Motion for Reconsideration (denying that Motion).

C. The District Court's August 24, 2020 Order on DCI Engineers' Motion to Dismiss (granting that Motion).

4. This appeal is taken to the Thirteenth Court of Appeals at Corpus Christie, Texas.

5. While the Order does not resolve all claims against all Defendants, they are immediately appealable as interlocutory orders pursuant to *Tex. Civ. Prac. & Rem. Code*. §150.002(f).

6. Underwriters have already commenced an appeal from the District Court's June 11, 2020 Order granting Mayse & Associates, Inc.'s Motion to Dismiss (for the alleged violation of *Tex. Civ. Prac. & Rem. Code*. §150.002). That is Thirteenth Court of Appeals Cause No. 13-20-00261-CV.

A. The first two Orders referred to above are directly connected with that appeal. They represent motions -- concerning the Defendant/Appellee (Mayse & Associates, Inc.) and *Tex. Civ. Prac. & Rem. Code*. §150.002 -- filed and/or resolved after that appeal was filed.

B. The third Order referred to above is also connected with that appeal. It concerns a different Defendant (DCI Engineers) subsequently being dismissed from this action on the same grounds as the Defendant/Appellee (Mayse & Associates, Inc.) in that appeal.

C. **Consequently, once the Thirteenth Court of Appeals assigns a docket number to this appeal, Underwriters will promptly move to consolidate the two appeals.**

7. No hearings were conducted regarding the three Orders that are the subject of this appeal, so there will be no Reporter's Record on appeal.

8. Counsel for Underwriters will promptly contact the Clerk of the Court to arrange for the Clerk's record on appeal.

9. Pursuant to Texas Rule of Appellate Procedure 28.1, this is an *Accelerated* Appeal.

Respectfully submitted,

DENENBERG TUFFLEY

/s/ Paul B. Hines

PAUL B. HINES (Texas Bar No. 24104750)

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Attorneys for Plaintiff Certain Underwriters at Lloyd's
of London

CERTIFICATION OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record of all parties to the above cause via Texas Court's e-filing system, which sends notice to counsel of record on the 31st day of August, 2020.

/s/ Felicia Tyson

Felicia Tyson

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Richard Capshaw on behalf of Richard Capshaw
Bar No. 03783800
anna@capslaw.com
Envelope ID: 45919642
Status as of 9/2/2020 3:23 PM CST

Associated Case Party: Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016

Name	BarNumber	Email	TimestampSubmitted	Status
Paul BHines		phines@dt-law.com	9/2/2020 2:14:43 PM	SENT
Evan J.Malinowski		emalinowski@dt-law.com	9/2/2020 2:14:43 PM	SENT
Felicia Tyson		ftyson@dt-law.com	9/2/2020 2:14:43 PM	SENT
Michael R.Marx		mmarx@dt-law.com	9/2/2020 2:14:43 PM	SENT
Davette Seldon		dseldon@dt-law.com	9/2/2020 2:14:43 PM	SENT

Associated Case Party: KK Builders, LLC, D'Amato Conversano, Inc d/b/a DCI Engineers, 1113 Structural Engineers, PLLC and Mayse & Associates, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Sachi A,Dave		sdave@patellegal.com	9/2/2020 2:14:43 PM	SENT
William Luyties		wkl@lorancethompson.com	9/2/2020 2:14:43 PM	SENT
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